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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 597

THE WESTERN UNION TELEGRAPH COMPANY, a corporation,

Petitioner,

vs.

PAUL NESTER and JUAN CHARLES, co-partners,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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I

Certiorari was not improvidently awarded.

Both the lower courts plainly placed their decisions on the ground that the tariff provision should be construed as providing for liquidated damages, and these decisions have been given wide publicity. A refusal to grant certiorari would have resulted in a flood of unmeritorious litigation, and so it was a clear case for the granting of the writ. Besides, the judgment cannot be supported on the ground urged by respondents.

II

There was no finding of fact that the plaintiffs suffered any actual loss; and if there had been such a finding there was no evidence to sustain it.

The respondents rely here on the supposed finding of fact as to actual loss. There was however no such finding of fact. The finding was (R. 47) that the plaintiffs "have suffered and sustained damages, loss and injury, in the sum of $500", and the opinions of both the lower courts indicate that it was supposed to be justified only on the theory that they were entitled to liquidated damages. Liquidated damages are actual damages, in satisfaction for a legal injury, presumed conclusively to be compensation for a loss; which was all the finding of fact meant or was intended to mean. "Hence although we are unable to award to the plaintiffs the special damages they ask," said the district court, "they are entitled, under the facts alleged and proved, to the sum stipulated as liquidated damages in the contract" (R. 27).

But if treated as a finding of fact that there was an actual loss, of a character for which recovery could be had at law, as a result of the breach, there was no evidence to support it.

Respondents offer no explanation here of their failure to prove the date of the forfeiture, which was within their knowledge, but insist that it was proved that under Honduras law the shipment was not subject to confiscation until September fifth—two days after the money should have been paid.

But the plaintiffs closed their case without offering any evidence as to Honduras law. The defendant moved to dismiss on the ground, among others, that plaintiffs had failed to sustain the allegations in the complaint and that the damages alleged were not pleaded or proved to have been within the contemplation of the parties (R. 99); and this motion was denied (R. 100). The defendant then proceeded with its proof, and called as a witness the consul of the Republic of Honduras, introducing in evidence a translation

of "certain sections of the statutes" (R. 101) of that country. It is these sections of the Honduras statutes, introduced by the defendant, on which respondents now rely to sustain the judgment. No witness learned in the law of Honduras was called by either party. The consul testified that he was not a Honduras lawyer and was not familiar with any of the laws of Honduras pertaining to tariffs and duties outside of those contained in the volume produced (R. 100, 101). There was nothing to show that the sections received in evidence were *all* the relevant statutes, or that there were no rules or practices on the subject other than statutory ones. The translation was criticized by the court of appeals, and with some reason, as being obviously either erroneous or incomplete (R. 148), and that court properly pointed out that "under the circumstances, speculation is not a proper course of action" (R. 148). Speculation is the only support there is for the finding of fact if it means what respondents say. Not only can it not be determined definitely from the sections of the statutes in evidence on what date this particular shipment became subject to forfeiture, but there was nothing to show how long after it became subject to forfeiture law or custom demanded that the forfeiture should actually take place. That there was some discretion in the matter on the part of the authorities, and perhaps a period of grace or a privilege of redemption, seems evident from the fact referred to by respondents' counsel (brief, page 7) that Charles, the Honduras partner, as late as September 14, 1937, was still asking his agent at the port to "please intercede for us with the administrator of the customs."

Respondents contend that under Honduras law the shipment, arriving August fifteenth, was free of storage charges until August twenty-first, subject to such charges until September fifth, and after that subject to forfeiture (respondent's brief, pages 5 and 6). The storage charges were 36 lempira (R. 91), which is $18 (R. 92), per day; so by September third, the date of the breach, these charges alone, apart from duty, must have amounted to $216, or $66 more than the amount of the money order. Charles had to have

money from Nester to pay the amount due on the shipment even before there were accrued storage charges; without money from Nester he "could do nothing" (R. 91). It seems evident that the remittance even if it had promptly arrived would have been insufficient.

The burden was on the plaintiffs to show some direct connection between the breach and the loss; and this they wholly failed to do, although all the evidence on the subject was at their command.

III

The point that the actual loss was not within the contemplation of the company was duly raised below.

It was expressly raised in the motion to dismiss (R. 99).

In the "Concise statement of points on which the appellant intends to rely" in the court of appeals is included one to the effect that there is "no evidence that appellee suffered any damage" (R. 132) and another to the effect that the evidence "would not support a finding that they have been damaged in any sum" (R. 133); the reference clearly being to damage of a character for which the law would permit recovery in the absence of a valid limitation of liability.

It is true that because of the ground on which the district court had placed its decision the question as to the forfeiture of the goods being within the contemplation of the parties was not discussed in the court of appeals.

IV

As to the construction of the tariff.

Respondents make no serious attempt to sustain the construction adopted by the lower courts, and the only matters in their brief on this point which call for comment are as follows:

The *Neill case*, 57 Texas 283, decided in 1881, before the Interstate Commerce Act, involved a limitation of liability

to a nominal amount—ten times the amount received for sending the telegram, which was fifty cents. It made no difference there whether it was a limitation of liability or liquidated damages, the recovery having been for $1,750; and the point was not argued.

In the *Miazza case*, 50 Ga. App. 521, the court did not hold that all provisions for liquidated damages were in violation of the law of Georgia, but that agreements for fixed sums, "where the amount plainly has no reasonable relation to any probable actual damage which may follow a breach", will not be enforced as agreements for liquidated damages.

Counsel misinterprets footnote 22 on page 15 of our main brief. This was not an admission that the provision in question is ambiguous. It was on the contrary an explanation why the clause in the tariff was drawn in its present form; the explanation being that another and different form might possibly have been thought ambiguous.

Counsel comments on this court's recent decision in the *General American Tank Car case*, referred to on page 26 of our main brief, to the effect that this doctrine

> "applies only to administrative acts of the Commission; in the case at Bar the Commission had already passed on the tariff and it was part and parcel of petitioner's rates".

The point is that the Commission has never passed on the tariff if the tariff is to be construed as it was construed by the lower courts.

Dated: San Francisco, California,
February 28, 1940.

Respectfully submitted,

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